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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

Appeal From the Supreme Court of California.

JURISDICTIONAL STATEMENT.

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Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), 38B NIMLO Municipal Law Review 175, 192 (1975) 29

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JURISDICTIONAL STATEMENT.

The Opinion Below.

The opinion of the Supreme Court of California is reported at 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25. A copy is attached as Appendix A.

Jurisdiction.

1. This is a civil action brought by Appellants against the Appellee, City of Tiburon, to recover just compensation for the alleged taking of their private property. Alternatively, Appellants sought declaratory relief invalidating, on constitutional grounds, the ordinances which accomplished the taking of their land. Appellants charged that the City, by the adoption of open space ordinances and the application of the restrictive limitations of those ordinances to their real property, has completely destroyed the value of their property

for any purpose whatsoever and has also prevented any sale, use, transfer or development of their property, or any part of it, and has thereby taken Appellants' property without due process of law and without any compensation therefor in violation of the Fifth and Fourteenth Amendments. The decision of the Supreme Court of California was that, even if Appellants could prove that the open space ordinances deprived them of all value and use, they were not entitled to just compensation. As to declaratory relief, the court below, in a single sentence denied it (without inquiring into the facts), and upheld the validity of the ordinances.

2. The judgment of the Supreme Court of California became final as to that court on May 17, 1979. A timely Petition for Rehearing was denied on May 17, 1979. The Notice of Appeal to this Court was timely filed on July 6, 1979. On July 18, 1979, Mr. Justice Stevens extended Appellants' time to docket the appeal in this Court to October 12, 1979.

3. Jurisdiction of this Court is invoked by Title 28 U.S.C. §1257(2).

Cases sustaining jurisdiction of an appeal to this Court from the judgment of a state court holding that no taking of private property has occurred and no compensation is payable to the property owner by reason of the regulatory activities of state or local government are:

Penn Central Transportation Co. v. City of New York (1978) 438 U.S. 104;

Moore v. City of East Cleveland (1977) 431 U.S. 494;

Goldblatt v. Town of Hempstead (1962) 369 U.S. 590;

Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365;

Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393.

Constitutional Provisions and Statutes Involved.

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The full text of the City's open space ordinance, Ordinance 123 N.S., is set forth in Appendix D. Ordinance 124 N.S. rezoned Appellants' property into the open space category. It is set forth in Appendix E.

The pertinent California statutes are set forth in Appendix F.

Questions Presented.

1. Is it constitutionally permissible for a state court to hold unqualifiedly that payment of just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is *never* available as a remedy to a property owner who complains of such taking done by means of a regulation which effectively deprives him of his property?

2. Is it constitutionally permissible for a state court to hold unqualifiedly that the *only* remedy available to landowners whose property has been taken by regulation effectively depriving them of their property, is to seek judicial invalidation of such regulation?

3. Is it constitutionally permissible for a state court to hold without any factual inquiry whatever as to whether the regulated property is in fact economically or physically capable of being put to uses ostensibly permitted by the regulation, that as long as the regulation *says* that some uses are permitted, such statement *ipso facto* "belies" the landowners' allegations that in fact the regulation renders the property useless and worthless?

4. Where a state statute declares that acquisition for open space by cities is a public purpose for which public funds may be expended and for which the power of eminent domain may be exercised, does it become a taking of private property for public use when a city makes privately owned land "open space" by regulation?

5. On the facts at bench, where the Appellants' property was stultified by regulation into uselessness and worthlessness, does the constitutional policy of fairness require that the ensuing economic burden be borne by the benefited public as a whole and not be disproportionately placed on Appellants?

Raising the Federal Question.

The Complaint alleged the Federal Constitutional questions here presented. It charged that the effect and result of the application of the City's open space zoning ordinances to Appellants' five acres had been

to take their property "without due process of law and without any compensation therefor in violation of the Federal and State constitutional rights of Plaintiffs." (Complaint, Paragraph IX.) These same Federal Constitutional questions were presented at all stages of the appeal.

Statement of the Facts of the Case.

This appeal arises from the California Supreme Court's affirmance of the dismissal of Appellants' inverse condemnation and declaratory relief action. Thus, the substantive facts come from Appellants' Complaint, which for purposes of review are taken as true and are liberally construed under both Federal and California law.[1]

Appellants own five acres of undeveloped land within the City of Tiburon which they purchased for residential development uses and which, except for the restrictive ordinances adopted by the City, would have been available and adaptable for such residential uses. The five acres are classified as "ridgelands" and possess a magnificent view of San Francisco Bay and the surrounding areas.

The City of Tiburon is in Marin County, California, on the north edge of San Francisco Bay. It is one of the smaller cities of California, containing only 1,676 acres. Its population is 6,209 according to the 1970 census. The City's favorable climate, aquatic fa-

[1]Under California law facts alleged in the Complaint are treated as being true for the purpose of determining the sufficiency of those allegations. *Commercial Standard Ins. Co. v. Bank of America* (1976), 57 Cal.App.3d 241, 129 Cal.Rptr. 91. Zoning ordinances and City actions are a proper subject of judicial notice. *City of Los Angeles v. Wolfe* (1971), 6 Cal.3d 326, 331, 99 Cal.Rptr. 21, 491 P.2d 813; California Evidence Code §452(b).

cilities, proximity to the San Francisco Metropolitan area and sweeping view of San Francisco Bay make it one of the most desirable places to live within California. It has one of the highest land values per acre of the suburban areas of the State. Of the undeveloped acreage within the City, Appellants' five acres are among the most desirable and contain among the best views.

In 1959, California enacted Sections 6950-6954 of the Government Code which specifically authorize the acquisition of private property by local government for open space purposes. These open space purposes are declared to be public uses. The exercise of the eminent domain power to acquire property for open space is specifically authorized. The text of Sections 6950-6954 are set forth in Appendix F.

Commencing in 1967, the California Legislature enacted provisions in the Government Code giving authority for cities and counties to adopt General Plans for land use and setting forth the scope of such General Plans. In 1970, these provisions were amended to provide that General Plans must include an Open Space Element to be in accordance with the Local Open Space Plan provisions of the Government Code.[2] In 1972, the Legislature adopted Government Code Section 65302.2, making mandatory the adoption of General Plans with Open Space Elements.

Also in 1970, California enacted provisions in its Government Code requiring every city to adopt an open space zoning ordinance.[3]

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[2]The pertinent provisions of law are contained in Sections 65560-65567, the text of which are contained in Appendix F.

[3]The Open Space Zoning requirements are set forth in Sections 65910, 65911 and 65912, and included in Appendix F.

In early 1972, the City took action to preserve and maintain in open space a substantial portion of the City's then undeveloped acreage. In January, 1972, it hired Dean Witter & Co., Inc., to prepare and present a Financing Plan for open space acquisition. This Financing Plan was prepared in early July, 1972, and approved by the City at that time. It described and itemized various properties within the City, the acquisition by the City of which for open space purposes would be financed by a City bond issue. Included within the property to be acquired from the funds obtained in this bond issue were the Agins' five acres. The Financing Plan was accepted by the City, and the City sold the bonds and received $1,250,000 to purchase parcels of ridgeland for open space purposes. The City then purchased, for open space purposes, the property adjoining the Agins' land. The City, however, refused to allocate any part of the bond proceeds for the acquisition of the Agins' property.

Also in January, 1972, the City undertook to prepare its Open Space Plan by hiring Williams & Mocine to prepare it. The Plan was completed and adopted by the City in October, 1972. This Open Space Plan identified the Agins' property as "indispensable to and necessary for the open space program." It provided that the Agins' property be "forthwith purchased" for cash in accordance with the Dean Witter Financing Plan.

In furtherance of the recommendations of the firms that had prepared the Financing Plan and the Open Space Plan, the City, on October 25 and 26, 1973, adopted Resolutions authorizing condemnation for open space purposes of the Agins' five acres and of twenty-five adjoining acres. Six weeks later—on December

4, 1973—the City filed a Complaint in eminent domain against Appellants to acquire their five acres for public use, namely, for open space purposes.

In the year that followed, the City changed its mind regarding the method of keeping the Agins' property in open space. In November, 1974 the City filed a Notice of Abandonment of the eminent domain action, as the result of which the case was dismissed in May of 1975. Since that time the City has relied upon its zoning ordinances, 123 N.S. and 124 N.S. to accomplish its aims and objectives of preserving the Agins' five acres in open space.

On June 28, 1973, the City adopted Ordinance 123 N.S. by which it created special restrictive zoning for open space purposes. (Appendix D.) According to Ordinance 123 N.S. a zone classification of RPD-1, meaning "Residential Planned Development and Open Space Zone", is created. The only uses authorized are (1) one-family dwellings; (2) open space uses; and (3) accessory buildings and accessory uses. Density of buildings is limited to not less than one unit per five acres nor more than one unit per acre. Also on June 28, 1973 the City adopted the companion Ordinance 124 N.S. by which particular parcels of undeveloped land, including Appellants' five acres, were placed into this RPD-1 Zone. (Appendix E.)

Appellants alleged in their Complaint that the restrictions upon their property to the RPD-1 uses deprived them of all use and all value of their property. In effect, Appellants claim that, because of the zoning the property lost all its economic use and value for either one-family dwellings, for open space uses, or for accessory uses. The California Supreme Court, in ruling upon the allegations of the first cause of action

in inverse condemnation, treated those allegations of the Complaint as being true—*i.e.*, that no economic use or value existed for the property under that zoning.[4]

The five acres owned by Appellants were never formally acquired by the City. Rather, Appellants continue as the ostensible record owners of the property, but because of the restrictions of Ordinance 123 N.S. Appellants are unable to make any use whatsoever of their property. These actions by the City have completely destroyed the value of their property for any purpose or use by them whatsoever and have prevented any sale, use, transfer or development of the property or any part of it (except, presumably, a transfer by gift to the City for open space purposes).

The Agins' Complaint alleged two causes of action. The first was that the result of the City's actions has been the taking of their property without the payment of just compensation in violation of their Federal and State Constitutional rights and that they should have judgment for their just compensation. The second was for a declaratory judgment that the Open Space Zoning Ordinance was invalid because confiscatory and in excess of the City's authority.

The City demurred to Appellants' Complaint. The Trial Court sustained the demurrer without leave to amend as to the cause of action for inverse condemnation and sustained the demurrer on the cause of action for declaratory relief with leave to amend. Appellants

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[4]However, when the California Supreme Court considered the validity of the zoning under the second cause of action for declaratory relief, it stated, in contradiction of the allegations of the Complaint, that Appellants could make some economic use of their property and that it would have some value under this zoning. The Court ignored the allegation that, *as applied*, the Ordinance was confiscatory, and looked instead to the face of the Ordinance.

declined to amend their Complaint and the Trial Court thereupon entered a Judgment of Dismissal of the action on May 5, 1976. (Appendix B.)

Appellants then appealed to the California Court of Appeal and it, on April 24, 1978, reversed the Judgment of Dismissal of the inverse condemnation cause of action and affirmed the Judgment of Dismissal of the declaratory relief cause of action. The City then petitioned the California Supreme Court for a hearing, which was granted. The California Supreme Court, by its opinion printed in Appendix A, affirmed the dismissal by the Trial Court of both the first and second causes of action, holding that Appellants were not entitled to relief in either inverse condemnation or declaratory relief. Justice Clark dissented. With this action the Trial Court Judgment of Dismissal became final as to the California Courts. This Appeal followed.

The Issues Presented Here Are Substantial and of Widespread Impact.[5]

Introduction.

The facts are clear that the City of Tiburon decided to try its power of eminent domain like a new shoe,

[5]While the national aspects of the issues here presented are substantial, and are dealt with *infra*, it also warrants noting that the problem is particularly acute in California. In addition to the case at bench, two more California cases are expected to reach this Court at about the time the instant appeal is docketed. They are: *Furey v. City of Sacramento* (1979) .... Cal.3d ...., 157 Cal.Rptr. 684, ... P.2d ...., and *San Diego Gas & Electric Co. v. City of San Diego* (1978) 146 Cal. Rptr. 103 (summarily vacated by the California Supreme Court, and remanded to the Court of Appeal which on remand disposed of the cause adversely to the landowner, by unpublished opinion ignoring the factual findings of the Trial Court that San Diego's "regulations" totally deprived the land of use and value, and in turn remanded back to the Trial Court for a pointless retrial of the same facts).

and dissatisfied with the evident fit, accomplished the same purpose of converting the Appellants' land into public parkland (*i.e.*, "open space"[6]) through the subterfuge of "regulating" it into functional and economic oblivion. While the legal issues that form the background of this controversy are important and widespread—and for that reason amply deserve treatment by this Court—it is also important to emphasize that Appellants seek here the redress of rank injustice. Not only did they suffer effective confiscation of their property, but when they complained, they were denied so much as a day in court.

Whether viewed as a vehicle for settlement of sorely disarrayed law and national constitutional policies, or as implementation of the time-honored judicial function of doing justice, this case commends itself to review on the merits by this Court.

There Is a Vacuum of Legal Principle in the Field of Inverse Condemnation, That Desperately Needs Attention by This Court.

The problem of confiscatory land use regulation (the "taking issue" as it is sometimes called) is one of the most widespread, difficult, contentious, and growing areas of constitutional litigation in the country. The nation's travails in this area are fueled by two important factors:

[6]The California Legislature left no doubt (Cal. Government Code §51097 and §§6950-6954) that open space is a public use for which the power of eminent domain may be exercised. Nonetheless, here the city effectively acquired five acres of open space (and the benefits flowing from it) without the concomitant obligation to pay just compensation as required by the Constitution. This is indeed the "shorter cut" than permitted by the Constitution, that was deplored by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 416.

First, past decisions of this Court leave no doubt that each case calling for drawing of the line of demarcation between permissible regulation and unconstitutional taking requiring payment of just compensation, must be decided on its own facts. See e.g., *Penn Central Transportation Co. v. City of New York, supra,* at 438 U.S., 123-124, *Goldblatt v. Hempstead, supra,* 594, *United States v. Central Eureka Mining Co.* (1958), 357 U.S. 155. While this salutary principle of flexibility has its manifest virtues, it also carries with it the dangers of lack of predictability and of powerful incentives to further litigation, as both sides to this durable controversy increasingly press their causes upon lower court judges in an effort to identify and reduce to precedent those infinitely variable factual situations that are likely to further their positions.[7]

In short, there comes a point where even bad law is better than uncertain law that only serves to fuel acrimonious disputes, imposes needless burdens on the courts' and parties' resources, and in the end produces no reliable precedent likely to forestall more such disputes. Appellants therefore respectfully urge that the Court now devote

[7]Appellants respectfully urge the Court to reflect on the predicament facing even the most skilled lawyers, when they are called upon to explain to their clients on the basis of this Court's most recent expression (*i.e., Penn Central, supra,* 438 U.S. at 123-124), that there is ultimately no reliable way of predicting the probable outcome of this ruinously costly and protracted litigation, without pressing the cause all the way to this Court for the purpose of engaging in ". . . essentially, *ad hoc,* factual inquiries . . ." that point to no predictable outcome, but only serve to further ". . . identif[y] several factors that have peculiar significance" (438 U.S. at 124).

its attention to a balancing process. Having been told by this Court that inverse condemnation controversies are factually flexible, the nation now badly needs similar judicial guidance as to where flexibility ends and guiding precedent begins.

Second, the mechanisms of land use regulation have undergone a revolutionary change in the last decade. The notion of yore that construction of improvements on land need only be preceded by compliance with zoning ordinances and building codes, and issuance of a building permit, has by now joined such venerable images as the hand-cranked automobile. It would impermissibly swell this brief to provide even a thumbnail sketch of the details of today's regulations. Suffice it to say that in some portions of California as many as a dozen permits may be required before a landowner may construct a single family dwelling for his own use. In the case of larger scale projects, the regulatory travails become mind-boggling, with literally scores of permits from scores of agencies required, all resulting in an economic nightmare that at times not even the nation's wealthiest enterprises can afford.[8]

[8]It is undoubtedly subject to judicial notice, in light of these events' enormous notoriety and (in one instance) public comments by the President of the United States, that such giants as Sohio, Dow Chemical, and Walt Disney were forced to abandon their plans for major projects in California, not because these projects were ever substantively adjudged to be illegal or environmentally "bad", but simply because not even these enterprises, for all of their Croesus-like resources, could bear the economic burdens of interminable regulatory maneuverings that after the expenditure of millions of dollars and years of effort, produced no approvals, and only promised further consumption of time and money in pursuit of increasingly hydra-headed regulatory demands, with no prospect of resolution in sight.

Another vitally important element of the revolutionary change in land use regulation is the recent explosive balkanization of regulatory authority. No longer is one confronted with obtaining approval from a readily identifiable local regulatory entity. The historical dominance of this area by towns and counties has been diluted and overlaid by a layer cake of agencies that range all the way from state and regional bodies (such as the California Coastal Commission), all the way to bi-state entities (such as the Tahoe Regional Planning Agency), to federal agencies. Along with these novel regulatory super-agencies, the land use regulatory process has also been honeycombed from the bottom, as it were, by a multitude of mini-authorities such as local wetlands and historical conservation districts, water and sewage districts, all the way down to something called a "neighborhood" (see Revised Charter of the City and County of Honolulu, 1973, Art. XIII, Sec. 13-101 et seq.). Finally, as if all that were not enough, it now seems clear that the people of a community, can simply take matters into their own hands, and by initiative or referendum vote to change the zoning of even a single lot in their community. See *City of East Lake v. Forest City Enterprises* (1976), 426 U.S. 668.

Appellants hasten to point out that it is not their purpose to debate here the wisdom of such arrangements; their point rather is that governmental arrangements have necessary *constitutional* consequences, and legal approaches evolved in an earlier day frequently prove ineffective to protect the constitutional rights, as those rights come under attack by techniques un-

dreamed of when the basic principles of pertinent law were laid down. In short, just as this Court has demonstrated the need to recognize the changing social conditions in approving novel regulations (see *Village of Euclid v. Ambler Realty Co., supra*, at 272 U.S. 387) so too, there is a correlative need to recognize that eventually the new regulations impact on society in ways unanticipated in the past.

The principal problem with current regulatory reality is that all too often the multitude of big and little Caesars who do the regulating, their good intentions fueled by perceived (or at least professed) nobility of their socio-ideological goals (such as protection of the environment, urban aesthetics, historical preservation, growth control, etc.), pour out what two knowledgeable commentators have aptly called "a synergistic nightmare, a paralyzing mishmash" and a "bubbling cacophony of multitudinous edicts"[9] that often stultify literally all economically rational uses of stretches of land. The specter of American landowners being told to pay their taxes while simultaneously being denied any rational use of their property that would justify the values on which they are being taxed is not an exaggeration; it is a growing reality in many parts of the country.

The blunt fact is that there are simply *no* readily ascertainable and applicable legal criteria whereby one can gauge when all this furious regulatory activity trenches on constitutionally protected rights. An Ameri-

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[9]Hagman v. Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets*, The Real Estate Appraiser, Sept.-Oct. 1974, p. 5, at p. 7. Please note that Professor Hagman is a widely acknowledged national authority on land use law, whose casebooks and hornbooks on this subject are used in leading law schools throughout the country.

can citizen in one state finds that his supposed *federal* constitutional rights bear no resemblance to his fellows' rights in other states.[10]

Beyond that, if the public use for which the acquisition of private property is contemplated is a passive one (*e.g.*, open space), it quickly becomes apparent to callous governmental entities that the taking can be effected without parting with a thin dime if economically reasonable use of the desired land is prohibited[11] (see *e.g., Peacock v. County of Sacramento* (1969), 271 Cal.App.2d 845, 77 Cal.Rptr. 391, where all use of the subject property—save growing of grass—was forbidden while *ad valorem* taxes were increased every year; *City of Austin v. Teague*, (1978 Tex.)

[10]For example, New Jersey holds that a one-year stultification of land use is in itself a taking of a one-year option (see *Lonarch Corp. v. City of Englewood* (1968, N.J.), 237 A.2d 81), whereas California sees nothing wrong with as much as a fire-year "moratorium" (see *State v. Superior Court (Veta)* (1974), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497). Under similar circumstances New York law suggests about three years as the permissible limit (*St. Aubin v. Biggame* (1976, App. Div.) 381 N.Y.S.2d 533).

Wisconsin takes the position that zoning unproductive land as agricultural is unconstitutional (*Kmiec v. Town of Spider Lake* (1973, Wis.) 211 N.W.2d 471), while California sees nothing wrong with zoning "agricultural" barren desert land lying in the mouth of the Tijuana River (*Helix Corp. v. City of San Diego* (1978), 82 Cal.App.3d 932, 147 Cal.Rptr. 683).

[11]Much printer's ink has been expended debating the extent, if any, to which physical invasion is required to work a constitutional taking. In the context of this appeal, such disputations are wordplay. If the City of Tiburon were to want to build a road across the Appellants' land, it would eventually have to enter and do so. But if the City—as is the case here—only wants to see to it that the subject property remains untouched (*i.e.*, open space), it can accomplish its purpose—as was done here—by forbidding all rational use, and thereby effectively conscripting the Appellants as involuntary public open space keepers who can be made to pay for this "privilege" by having the property which they nominally "own" taxed.

570 S.W.2d 389, where all use of private land was frustrated, while local environmentalists went through the motions of seeking (somebody else's) funds to acquire it; and *Arastra Limited Partnership v. City of Palo Alto* (1975, N.D. Cal.), 401 F.Supp. 962, where after deciding that it wanted to acquire the subject property for a park, the city set out to do so without compensation, by means of imposing a complex scheme of "regulations" which in fact made the property unusable[12]).

Beyond these problems lies an even darker side of government. Environmental or growth control regulations can be so applied as to increase the cost of available land dramatically, and thereby exclude any realistic chance of the disadvantaged, or even the lower-middle class, from coming into the tony community that—*mirabile ductu!*—is now able to exclude the disfavored population without so much as a hint of racial or socioeconomic epithets, or the bother of having to withstand the scrutiny required by *Village of Arlington Heights v. Metro Housing Dev. Corp.* (1977), 429 U.S. 252. On the contrary, the doers of such deeds are able to present themselves in public as noble and civic-minded protectors of the environment and of community values[13] (see *Ybarra v. Los Altos Hills* (1974, 9th Cir.), 503 F.2d 250, and compare *Appeal of Kit-Mar Builders, Inc.* (1970) 439 Pa. 466, 268 A.2d 765).

[12]Following that decision, the City of Palo Alto settled the case for some $4,500,000, whereupon the opinion of the District Court was vacated by stipulation. 417 F.Supp. 1125.

[13]Of course, in this day and age, appearances have to be observed, particularly in legendary Marin County which adroitly manages to be probably the most exclusive county in California (if not the country) while simultaneously priding itself on its liberal image. For a bit of ingenious tokenism, see *Winkelman v. City of Tiburon* (1973), 32 Cal.App.3d 834, 108 Cal.Rptr. 415.

Even if exclusion is not intended, it results anyway by the inexorable working of economics; scarcity-caused high cost of housing in California is notorious and requires no elaboration.

In short, land use regulation, like any other species of governmental regulation can be, and is being, abused. Its victims, whether the disadvantaged segment of the population effectively excluded from a fair crack of pursuing the vaunted American dream, or persons such as the Appellants who have been singled out for effective confiscation of their lawfully accumulated property, are entitled to the protection of their constitutional rights, and here is where the problem comes in.

There is abroad an intellectual vacuum of principle. This Court has entertained cases of this type so infrequently, and disposed of them with such paucity of doctrinal principle applicable to diverse factual situations,[14] as to provide the lower courts around the country with precious little reliable precedential guid-

[14]Appellants would be inhibited from making so bold a statement were it not for the fact that in *Penn Central Transportation Co. v. City of New York, supra,* at 438 U.S. 124, this Court was quite explicit in pointing out its own inability to formulate a reliable guide to the delineation of the boundary separating permissible regulation from regulatory inverse condemnation, and its tendency to make *ad hoc* inquiries into the facts of each case. Unfortunately, in the 57 years that have elapsed since the seminal decision in *Pennsylvania Coal Co. v. Mahon, supra,* this Court has considered only a handful of such cases on the merits. See *United States v. Central Eureka Mining Co.* (1958), 357 U.S. 155; *Goldblatt v. Hempstead, supra; Penn Central Transportation Co. v. City of New York, supra,* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979) .... U.S. .... [59 L.Ed.2d 401]. The factual and legal contexts of these decisions are so diverse that, as a practical matter, one finds it impossible to extract from them any reliable legal doctrine of sufficient substance to guide landowners or governmental entities in their dealings with one another.

ance. The upshot is that whether suffering from lack of clear constitutional principle, or secure in their belief that this Court is not likely to review the matter on the merits, courts around the country have in recent years structured a bewildering intellectual smorgasbord of liability criteria and remedies (or, as in the case at bench, non-remedies), whose result is that no one can predict the outcome of inverse condemnation litigation, nor indeed say what one's remedy may be.

Appellants, therefore, respectfully urge that intervention by this Court is badly needed, not only to relieve them of their confiscatory plight, but also to provide a desperately needed elucidation of principle that will permit disposition of similar controversies, without the exorbitant cost, delay, uncertainty and injustice that are familiar by-products of the current admittedly *ad hoc,* case-by-case approach to the problem of confiscatory regulation that is bedeviling the country.

The Law Governing Remedies Available to an American Property Owner Whose Land Has Been Unlawfully Taken Is in a State of Chaos.

Since the case at bench presents the issue of appropriate remedy as well as that of uncompensated regulatory taking, Appellants urge that the problem of remedies alone warrants intervention by this Court. This is so because as one surveys the record of state courts responding to aggrieved landowners' Fourteenth Amendment challenges to confiscatory land use regulation, the pattern is chaotic.

Thus, Ohio takes the position that a landowner's remedy is inverse condemnation damages (*Village of Willoughby Hills v. Corrigan* (1972) 29 Ohio St. 39, 278 N.E.2d 658, 665, *cert. den. sub nom. Chongris*

v. Corrigan (1972) 409 U.S. 919, Mr. Justice Douglas dissenting).[15] So does Nebraska (*State v. Mayhew Products Corp.* (1979) 281 N.W.2d 783, 786). In contrast, California and Arizona (*Davis v. Pima County* (1978, Ariz. App.), 590 P.2d 459, *cert. den.* (1979) .....U.S. ..... [61 L.Ed.2d 312]) take the diametrically opposite position, deny damages, and purport to allow invalidation as the sole remedy.

Florida at first blush purports to follow the California-Arizona approach (*Mailman Dev. Corp. v. Hollywood* (1973, Fla.App.), 286 So.2d 614), but does not necessarily do so (see *Askew v. Gables-by-the-Sea* (1976, Fla.App.) 333 So.2d 56, *cert. den.* (1977, Fla.) 345 So.2d 420). More recent Florida developments thicken the fog: In *Moviematic Industries, Inc. v. Dade County* (1977, Fla.App.) 349 So.2d 667, 672, the court at first hewed to the *Mailman* approach of invalidation as remedy, but concluded by suggesting that the monetary inverse condemnation remedy remains available under some (but alas, unspecified) circumstances.[16]

Texas takes yet another approach and allows *both* invalidation and damages for interim losses suffered (*City of Austin v. Teague, supra*). However, Texas

[15]The dissenting observations of Mr. Justice Douglas are called to the Court's attention; particularly his perceptive views on ostensibly regulatory takings for scenic easements (409 U.S. at 920), as well as his recognition of the need to structure appropriate remedies (409 U.S. at 921).

[16]Florida law thus reaches the level of an unabashed Catch-22. An aggrieved Florida landowner must show that a regulation is confiscatory; *i.e.*, that his property is now worthless. But if he is limited to certiorari as his remedy (which is what *Mailman* suggests) he cannot make such a showing, because certiorari is limited to judicial review of the administrative record, and in administrative zoning proceedings there is no opportunity to put on expert appraisal testimony going to land values.

makes the owner's out-of-pocket losses the standard of recovery, rather than the customary rental value of the property temporarily taken. Similarly, Washington permits both remedies (*Brazil v. City of Auburn* (1979, Wash.App.), 598 P.2d 1).

New York, not unlike Florida, presents a thoroughly bewildering picture. It prefers the invalidation remedy (*Jensen v. City of New York* (1977), 42 N.Y.2d 1079, 369 N.E.2d 1179), but points out that where the impact of the excessive regulation is irreversible, the monetary inverse condemnation remedy is available (see *Fred. F. French Investing Co. v. City of New York* (1976), 39 N.Y.2d 587, 350 N.E.2d 381). In that situation, New York provides for temporary rental as the measure of compensation (see *Keystone Associates v. State* (1975, Ct.Cl.), 371 N.Y.S.2d 814, rev'd. (1976, App.Div.), 389 N.Y.S.2d 895, rev'd. and remanded (1978), 45 N.Y.2d 894, 383 N.E.2d 560). The bewildering part is that even in some cases where the aggrieved landowner demonstrably suffered irreversible damage, the New York Court of Appeal refused to award compensation (See *Charles v. Diamond* (1976, App.Div.), 366 N.Y.S.2d 921, rev'd (1977) 41 N.Y.2d 378, 369 N.E.2d 1295).

Within the last few months this already murky picture was further clouded when Kansas opted for inverse condemnation damages as the proper constitutional remedy (see *Ventures in Property 1 v. City of Wichita* (1979, Kan.), 594 P.2d 671, and note that its holding and theory are directly contrary to *Jensen v. City of New York, supra*). Similarly, Colorado rejected invalidation as an unqualified remedy, astutely noting that it is useless in cases of cumulative or successive administrative acts, and is incapable of providing a forum

in which governmental bad faith may be tried. *Hermanson v. Board of County Com'rs., etc.* (1979, Colo. App.), 595 P.2d 694, 695 (cert. den.).

Space limitations forbid further analysis of this kind. Suffice it to say that to an American landowner seeking relief for violation of his *federal* constitutionally protected property rights, the law provides only the prospects of haphazard and totally *ad hoc* adjudication that at best varies with location. There is no other provision of the federal Constitution that has been permitted to drift in this fashion, to be so whimsically construed by diverse local tribunals.

This remedial aspect of the case at bench amply warrants consideration on the merits by this Court, so that some national criteria for remedial enforcement of the Fifth Amendment's just compensation clause can be established.

The Decision Below Destabilizes the Law by Disregarding This Court's Holding on Federal Constitutional Grounds That an Aggrieved Property Owner's Primary Remedy for Uncompensated Taking Is Monetary.

Little need be added to the above heading; this Court has addressed the issue several times with results that leave little room for argument. The leading decision is *Hurley v. Kincaid* (1932), 285 U.S. 95, which reversed the lower courts' decisions granting injunctive relief against a threatened uncompensated taking, and relegated the landowner to his monetary inverse condemnation remedy. The rationale for this decision was two-fold.

First, that the illegality inherent in an uncompensated taking of private property is the failure to

compensate, and this affords no basis for specific relief if the compensation may be procured in an action at law (285 U.S. at 104). In other words, where the governmental entity embarks on a course of action that pursues legitimate public objectives, but is flawed by an illegality (*i.e.*, failure to compensate) the law will undo the illegality and provide compensation, rather than vitiate the whole governmental purpose and public policy by invalidating the entire enactment.

Second, in this Court's words:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showings that its intervention is necessary in order to prevent an irreparable injury." (285 U.S. at 104, fn. 3).

For more recent applications of this principle, see *Dugan v. Rank* (1963), 372 U.S. 609, and its companion case, *Fresno v. California* (1963), 372 U.S. 627, both holding that inverse condemnation damages, and not invalidation or injunction, constitute the proper constitutional remedy. Please note *Dugan's* reiteration of the familiar principle that to invoke this rule the unlawful taking need not be physical (372 U.S. at 625); accord, *Penn Central Transportation Co. v. City of New York, supra*, at 438 U.S. 123, fn 25).

More recently, in the *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, this Court had another occasion to speak to the issue of remedies, with

results that leave precious little room for debate. There, the lower court invalidated the Act because it worked an uncompensated taking. This Court reversed, holding that as long as access to compensation remained (via an inverse condemnation suit in the Court of Claims under the Tucker Act[17]) invalidation was improper.

Nor is that all. This Court also addressed the issue of remedies specifically in the context of California law in *United States v. Gerlach Live Stock Co.* (1950), 339 U.S. 725, 752-753, holding that where California destroyed certain private water rights by enactment of a police power provision in its Constitution (dealing with water conservation—Cal. Const., Art. XIV, §3), such rights remained *compensable*, albeit not enforceable by injunction or other specified relief.

In sum, this Court's expressions are quite clear that the Constitution means just what it says; that where private property is unlawfully taken for public use without just compensation, that missing ingredient will be supplied by the courts whose prerogative it is to do so (*Monongahela Nav. Co. v. U.S.* (1892), 148 U.S. 312, 327).

The California Supreme Court's decision below improvidently upsets the time-honored division of responsibility between the legislature and the judiciary, whereby legislatures fix regulatory and acquisitory policy and the courts insure compliance with the constitutional mandate that just compensation be paid upon taking of private property. The decision below sets up the courts as some sort of super board of zoning appeals

[17]This is *a fortiori* consistent with California law. There, access to the courts to seek just compensation exists directly under the state constitution (Cal. Const., Art. I, §19). See *Rose v. State* (1942), 19 Cal.2d 713, 720, 123 P.2d 505.

that gets to review and strike down those land use regulations that prove to be expensive (*i.e.*, those that work a taking of a property right). Wholly aside from the disharmony within the law that this approach creates, it is simply bad public policy that threatens to embroil the already much burdened judiciary in often political, complex local land use controversies on an ongoing basis, in a way reminiscent of the old substantive due process days.

If the Decision Below Is Permitted to Harden Into Precedent, the Necessary Consequence Will Be a Massive Shifting of Local Land Use Control Controversies Into the Federal Courts, Thereby Needlessly Enlarging Their Caseloads.

A policy consideration extremely important to the federal judiciary arises ineluctably from the juxtaposition of the opinion below and this Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency, supra,* .... U.S..... [59 L.Ed.2d 401].

For reasons touched on elsewhere in this brief, today specific remedies do not provide aggrieved landowners with effective remedies. And so, such owners experience a powerful incentive to seek monetary relief. When they act on that incentive, they discover a closed state courthouse door (*i.e.*, the ruling at bench which flatly denies them the right to seek just compensation), but simultaneously they are told by this Court in *Lake Country Estates* as well as by the lower federal courts in numerous other cases,[18] that their plea for mone-

[18]In recent years, it has become quite clear that in the area of property rights, just as in the case of any other fundamental rights protected by the Constitution (see *Lynch v. Household Finance Co.* (1972), 405 U.S. 538, 552), the federal courts,

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tary relief in the form of constitutionally promised just compensation will be entertained. Under these circumstances it is but rhetorical to ask what should a rational aggrieved landowner represented by counsel of minimal competence do. Obviously, sue in the federal courts.

While this may well have been unintended, what the California Supreme Court accomplished with a stroke of its pen in the decision below, is effectively to transfer into the federal courts *all* of the most difficult *local* land use controversies. While "taking issue" controversies are no doubt difficult (and the

faithful to their historical role as guardian of the federal Constitution, will entertain cases of regulatory impairments of property rights so severe as to deprive landowners of reasonable use of their property, thereby giving rise to constructive takings. In addition to this Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency, supra,* see *Gordon v. City of Warren* (1978, 6th Cir.) 579 F.2d 386, *Rodgers v. Tolson* (1978, 4th Cir.) 582 F.2d 315, *Cordeco Dev. Corp. v. Santiago Vazquez* (1976, 1st Cir.) 539 F.2d 258, *Barbaccia v. County of Santa Clara* (1978, N.D. Cal.) 451 F.Supp. 260, *Sixth Camden Corp. v. Township of Evesham* (1976, D.N.J.), 420 F.Supp. 709, *Sanfilipo v. County of Santa Cruz* (1976, N.D. Cal.), 415 F.Supp. 1340, *Dahl v. City of Palo Alto* (1974, N.D. Cal.), 372 F.Supp. 647, *Rasmussen v. City of Lake Forest* (1975, N.D. Ill.), 404 F.Supp. 148, *Immobilaria Borinquen v. Garcia Santiago* (1969, D.P.R.), 295 F.Supp. 203, *Hotel Coamo Springs v. Hernandez Colon* (1976, D.P.R.), 426 F.Supp. 664. The foregoing cases are but a sampling; no attempt has been made in this limited space to canvass the pertinent federal law. It is simply too late in the day to question the federal courts' jurisdictional basis for entertaining cases in which it is alleged that state or local officials have abused the power of eminent domain by taking private property without just compensation. See *Mosher v. Phoenix* (1932) 287 U.S. 29.

Moreover, the recent holdings of this Court expanding the availability of Civil Rights Act remedies to property rights (*Lynch v. Household Finance Co., supra*) and against local governmental entities (*Monell v. Department of Social Services* (1978), 436 U.S. 658) make it a virtual certainty that landowners confronted with a barred state courthouse door, will take their cases seeking just compensation to the federal courts.

resulting valuation evidentiary problems of legendary tedium and length), and while one can understand how California courts may be altogether unrepentant as they watch would-be land use litigants streaming from their courthouse into the federal one, this is a matter of considerable policy importance to the overburdened federal judiciary. Whether such shift of these litigational burdens from the state to the federal courts is good or bad policy is for this Court to decide; it is a decision that should be quite consciously made and not be forced on the federal judiciary by the stroke of a state court's pen. Wholly aside from their own interest which impels them to urge reversal, Appellants respectfully urge that in the long run, a decision in their favor (*i.e.*, one requiring state courts to enforce the federal constitutional just compensation remedy) will have the wholesome side effect of preventing a substantial and needless increase in the litigational burdens imposed on the federal courts.

Under the Ruling Below, There Is No Practical Remedy Available to Aggrieved California Landowners Who Are Thus Denied Not Only Just Compensation but Due Process of Law as Well.

While the opinion below pays lip service to the cause of non-monetary remedies said to be available to the inverse condemnee/landowner (*i.e.*, administrative mandamus and declaratory relief), *in fact* no such remedies exist.

Taking these asserted remedies in reverse order, the opinion below itself exposes the inefficacy of declaratory relief. It is permitted only as a means of attacking the *facial* invalidity of the ordinance. Thus, at bench the challenged ordinance *says* that Agins may build

between one and five dwellings on his land (maybe), and on that basis he was not even afforded a day in court to show that *as applied* to him, he could not build anything economically viable, or put the subject property to any other economically rational uses. This is directly contrary to *Nectow v. Cambridge* (1928), 277 U.S. 183, holding such determinations to turn on the facts of the specific case; accord, *Portsmouth Harbor, etc. Co. v. U.S.* (1922), 260 U.S. 326.

As for administrative mandamus on present California law it is totally ineffective.[19] This is so because in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111, the California Supreme Court held that "the law" which is to be tested in mandamus proceedings is not the law (or administrative act) that initially aggrieved the plaintiff-landowner and caused the litigation, but rather "the law" (or administrative act) as it happens to be at any time the defendant entity chooses to change it before a final judicial determination.[20]

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[19]It is of utmost significance that there have been no reported California cases invalidating land use regulations on grounds of confiscation since *Kissinger v. City of Los Angeles* (1958), 161 Cal.App.2d 454, a case more in the nature of proscribed pre-condemnation value depression than regulation. In the quarter-century that elapsed since *Kissinger,* California courts have shown no inclination to grant such relief, even if they have given it much lip service while turning away plaintiffs suing in inverse condemnation. See *e.g., HFH, Ltd. v. Superior Court* (1975), 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365, *cert. den.* 425 U.S. 904, *State v. Superior Court (Veta)* (1974), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497.

[20]The abusive potential of this aspect of California law becomes apparent from the following advice given by James Longtin, City Attorney for the City of Thousand Oaks, California, instructing his fellow municipal lawyers:

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Beyond that, California governmental entities have at their disposal a weapon that renders them immune to non-monetary relief: simple inaction. How does one get an "administrative" adjudication of a *lack* of administrative action? That this is no conjectural fear may be seen from *Cordeco Dev. Corp. v. Vazquez* (1972, D.P.R.), 354 F.Supp. 1355, aff'd. (1976, 1st Cir.), 539 F.2d 258, where a landowner's application for a required permit was simply ignored, and eventually a useless, sham permit was issued. In that connection, please bear in mind that the new land use regulations often profess to be environmentally-minded and purport to seek to preserve land in its original "open space" condition. Thus, governmental inaction becomes a potent weapon with which to force the owner to do nothing with his land,

Thus, practically speaking, a California landowner can get no effective relief through administrative mandamus proceedings. At most, if he files a meritorious suit, his adversary can simply change its position, and in Longtin's words, quoted *supra,* "everybody starts over again." That—it is submitted—is no remedy; it is rather an illusion that serves to deny to the victims of unconstitutional regulation due process of law.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

Conclusion.

That the definitional problem of taking by regulation presents difficult and heretofore unresolved constitutional issues, is a proposition that was explicitly recognized in *Penn Central,* and needs no belaboring. It is an area in which analytical intervention by this Court is an urgent national necessity.

But, as the case at bench illustrates, the question of remedies is of equal importance. Substantive rights, even of constitutional dimensions, have no meaning unless their theoretical beneficiaries can avail themselves of remedies and make those rights a reality. Here, however, Mr. and Mrs. Agins were deprived of their substantive property rights, and indeed, without so much as a day in court, through the expedient of being denied any meaningful remedy.

Moreover, permeating the opinion below is the explicitly voiced notion that it is too expensive to follow the Constitution[21] and that local governments, in order to govern, need to be given a *carte blanche* to invade private property rights with complete impunity, risking only a theoretical judicial slap on the wrist—if that. These arguments are of little merit.

It bears recalling that the same spurious doctrine was hauled out of storage in recent efforts to deny equal rights to American citizens, only to be rejected as intolerable by this Court:

> ". . . vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis* (1963), 373 U.S. 526, 537.

[21]It is unfortunate that in structuring its economic arguments, the court below relied on polemical student writings, some of which espoused the gaffe of urging a supposed cost-benefit analysis that was premised on an assumption that no cost would be incurred. Yet such pursuit of the proverbial free lunch was improvidently endorsed.

The governmental entity that would forego the obligation of having to comply with the Constitution's "just compensation" command has its remedy in its own hands: refrain from taking private property whether by seizure or by ingenuity that by wordplay leaves the aggrieved landowner with nothing of use or value, but still liable for property taxes. To suggest that a city (and by necessary implication every petty regulatory body across the land) should have the "right" to thus wreak havoc on property owners within its jurisdiction, with nothing to fear save an occasional judicial tut-tut of the "you shouldn't have done it" genre, erodes the values protected by the Bill of Rights. Such an argument has not been tolerated with respect to other constitutionally protected rights,[22] and no reason appears why it should be countenanced as to property rights. As this Court emphasized in *Lynch v. Household Finance Co., supra,* at 405 U.S. 552, the supposed dichotomy between personal and property rights is a false one, because the former cannot be enjoyed unless the latter are respected. A government that is permitted to impoverish its citizens with impunity, is a government possessed of unbridled tyrannical powers.

Both the equities of this factual situation and the urgent national need for clarification of the substantive and remedial aspects of this litigation-spawning "taking issue" cry out for intervention by this Court.

[22]See *Bivens v. Six Unknown Named Agents* (1971), 403 U.S. 388, and its applications canvassed in *Jacobson v. Tahoe Regional Planning Agency* (1978) 566 F.2d 1353, 1364, fn. 23.

Mr. and Mrs. Agins pray that probable jurisdiction be noted.

Respectfully submitted,

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October, 1979.

APPENDIX A.

Opinion of the Supreme Court of California.

[S.F. No. 23866. Mar. 14, 1979.]

[As modified May 17, 1979.]

Donald W. Agins et al., Plaintiffs and Appellants, v. City of Tiburon et al., Defendants and Respondents.

COUNSEL

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OPINION

RICHARDSON, J.—We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation.

Plaintiffs own five acres of unimproved land in the City of Tiburon, Marin County. Tiburon has an area of 1,676 acres, a population of approximately 6,000, and because of its proximity to San Francisco, its aquatic facilities, temperate climate, and other geographic advantages, is a very desirable suburban residential area. Plaintiffs' real property is ridgeland, possesses views of San Francisco Bay, and was acquired by plaintiffs for residential development.

Tiburon, like every other city in California, is required by state law to prepare a general plan containing, among other things, "A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space . . . and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." (Gov. Code, § 65302, subd. (a).)

Routinely, the development of a general plan entails a careful examination of numerous social and economic factors. Many cities, especially those which are too small to maintain a staff of sufficient size and technical expertise to undertake such a project, seek the advice of expert consultants. The recommendations of these consultants are considered when the local governmental entity prepares its general plan.

In January 1972 Tiburon retained two private consultants, Williams & Mocine and Dean Witter & Co., Incorporated, to prepare advisory reports. The Williams report, issued in October 1972, focused on possible land use designations and recommended that Tiburon attempt to acquire "a substantial portion of Tiburon

ridge" for "open space." Plaintiffs' property was identified in the report as one of those parcels of property which were suitable for acquisition for open space. The Witter report, dated July 1972, recommended that the purchase of open space lands be financed through the issuance of $1.25 million of general obligation bonds. The subsequent resolution of the Tiburon City Council approving sale of these bonds did not specifically authorize acquisition of plaintiffs' property or directly refer to it.

By Ordinance No. 124 N.S., effective June 28, 1973, Tiburon adopted widespread zoning modifications which drew upon but did not mirror the consultants' reports. Under the ordinance, plaintiffs' land was designated "RPD-1," defined by Ordinance No. 123 N.S. as a "Residential Planned Development and Open Space Zone." The authorized uses of land so designated are (1) *one-family dwellings*, (2) open space uses, and (3) accessory buildings and accessory uses. The permissible density of buildings is "not less than .2 nor more than 1 dwelling unit per gross acre" depending on other specified provisions. As applied to plaintiffs' five acres "RPD-1" zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build five dwelling units, or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report.

Plaintiffs have never made application to use or improve their property following Tiburon's adoption of Ordinance No. 124 N.S., nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land. On October 15, 1973, plaintiffs filed a claim against the

City of Tiburon in the amount of $2 million alleging that the adoption of Ordinance No. 124 N.S. had completely destroyed the value of their property. The city rejected the claim on November 12, 1973.

On December 4, 1973, Tiburon filed a complaint in eminent domain against plaintiffs to acquire their property, but on November 1, 1974, filed a notice of abandonment of the proceedings as then authorized by Code of Civil Procedure section 1255a, subdivision (a). (This section was repealed by Stats. 1975, ch. 1275, § 1.) The trial court entered its judgment of dismissal of the action on May 20, 1975. The city paid plaintiffs $4,500 for their necessary expenses incurred during the pendency of the action pursuant to section 1255a, subdivision (c), which then fixed the rights of a condemnee upon abandonment of a condemnation proceeding. The remedy was exclusive and the section did not include, as an element of damages, financial impairment during pendency of the eminent domain action of the owner's right to sell. Accordingly, there was no further cause of action available to plaintiffs by reason of the city's eminent domain proceeding.

On June 16, 1975, plaintiffs filed their complaint in the Marin County Superior Court against the City of Tiburon and Does One through Fifty alleging, as a first cause of action, a claim in inverse condemnation for $2 million damages and requesting, in a second cause of action, declaratory relief, asserting, among other things, that Ordinance No. 124 N.S. is unconstitutional in that it "constitutes a taking of [plaintiffs'] property without payment of just compensation."

Defendants' general demurrer to the first cause of action (inverse condemnation) was sustained without

leave to amend. Similarly, their demurrer to the second cause of action (declaratory relief) was sustained with 10 days leave to amend. Plaintiffs declined to amend their second cause of action and plaintiffs appeal from the ensuing judgment of dismissal with prejudice.

Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of [plaintiffs'] property without payment of just compensation" for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121), who expresses his view in this manner: "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*" (Italics added.)

We have previously pointed to the general nature of the appropriate remedy in such cases. In *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237 [115 Cal.Rptr. 497, 524 P.2d 1281], real parties had been granted a permit to develop their coastal lands by a regional commission. They brought suit when a permit was denied following an appeal to the California Coastal Zone Commission. We held that declaratory relief was an appropriate remedy by which to seek a declaration that a statute controlling development of coastal lands was facially unconstitutional. Further, insofar as the challenge was to the constitutionality of the act's *application* to the lands of the complaining parties, we concluded that the proper and sole remedy was administrative mandamus.

Similarly, a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. (See *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 678 [146 Cal.Rptr. 687].) To the extent that *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575], is contrary, it is expressly disapproved.

There is a clear, direct and unquestionable constitutional basis for the protection of private property. Amendment V of the United States Constitution provides that "No person shall be . . . deprived

of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." In concert with the foregoing Fifth Amendment language article I, section 19, of the California Constitution mandates that "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner."

"Property," in a legal sense, has been broadly defined. The United States Supreme Court has said that the term "property" is not used in "the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." (*U.S. v. General Motors Corp.* (1945) 323 U.S. 373, 377-378 [89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390].)

While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment.

In balancing the constitutional rights of the landowner against the legitimate needs of government we do not ignore well established precedent. In *Pennsyl-*

vania Coal Co. v. Mahon (1922) 260 U.S. 393 [67 L.Ed. 322, 43 S.Ct. 158, 28 A.L.R. 1321], an injunction was sought to prevent a coal company from causing subsidence of property due to the company's underground mining activities. This Supreme Court opinion has generated some confusion and has even been cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases because of Justice Holmes' statement that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Mahon, supra,* at p. 415 [67 L.Ed. at p. 326].) It is clear both from context and from the disposition in *Mahon,* however, that the term "taking" was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The court did not attempt, however, to transmute the illegal governmental infringement into an exercise of eminent domain and the possibility of compensation was not even considered.

In *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237], we examined directly the problem of available remedies for aggrieved landowners and held that inverse condemnation does not lie in zoning actions in which the complaint alleges the mere reduction of market value, and that a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging of property. In *HFH, Ltd.* we specifically noted that "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day." (P. 518, fn. 16, italics in original.) We now reach that issue.

While it is true that the land uses which were regulated in *HFH, Ltd.* were commercial, we find no reason to distinguish it on that basis from similar situations in which the regulation affects land used for residential, recreational, or other purposes, or to extend the additional relief of inverse condemnation to the owners of noncommercial property. (For a discussion of a contrary analysis which recommends the extension of a damages remedy in a noncommercial context, see Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977) 86 Yale L.J. 385, 507-511.)

We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged. The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of people "problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private

lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 386-387 [71 L.Ed. 303, 310, 47 S.Ct. 114, 54 A.L.R. 1016].)

In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 120 [109 Cal.Rptr. 799, 514 P.2d 111].)

Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory

powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." (Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L.J., 1569, 1597.)

We envisage that the availability of an inverse condemnation remedy in these situations would pose yet another threat to legislative control over appropriate land-use determinations. It has been noted that "The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses." (Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance* (1974) 26 Stan.L.Rev. 1439, 1450-1451; see also Bowden, *Legal Battles on the California Coast: A Review of the Rules* (1974) 2 Coastal Zone Management J. 273.)

Other budgetary consequences reveal themselves when the land use control is exercised by means of

the initiative. "Legislation in the nature of zoning can be and has been enacted by the people through a direct initiative. Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury? The logical extension of requiring compensation for the mere enactment of a harsh zoning measure indicates that the answer would be in the affirmative. The potential for fiscal chaos would be great if this were the result." (28 Hastings L.J., *supra*, at p. 1598, italics in original.)

In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

Having clarified the nature of the remedies available to an aggrieved landowner, we now consider whether the property owners before us established their right to declaratory relief. We conclude that they did not.

An ordinance which on its face results in a mere diminution in the value of property is not per se improper. In *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, we examined a change in zoning which reduced the value of property from $400,000 to $75,-000. We concluded that no remedy was available for a mere decrease in the value of property. By this holding we acknowledged a practical truism which had been expressed by Justice Holmes more than 50 years ago in the *Mahon* cases: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such

change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." (*Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at p. 413 [67 L.Ed. at p. 325].)

Accepting as we must the general proposition that whether a regulation is excessive in any particular situation involves questions of degree, turning on the individual facts of each case, we hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. The ordinance before us had no such effect. According to the wording of the ordinance, of which we may take note, the RPD-1 zoning allows plaintiffs to build between one and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented. Taking cognizance of the use which plaintiffs were entitled to make of their land the trial court was justified in finding that the ordinance did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value. The trial court acted properly in determining that plaintiffs were not, as a matter of law, entitled to a favorable judgment in declaratory relief.

Plaintiffs also argue that the city's "precondemnation activities," those being the authorization of studies which recommended acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding, were so unreasonable as to provide a separate basis for an action for inverse condemnation. Plaintiffs err and we do not find persuasive their re-

liance on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 [104 Cal.Rptr. 1, 500 P.2d 1345], for support for their contention.

Klopping involved a plaintiff's recovery for the decline in market value as the result of an unreasonable delay in the institution of eminent domain proceedings following announcement of intent to condemn, and other unreasonable conduct prior to condemnation. In the matter before us there was no such delay or conduct. Tiburon instituted eminent domain proceedings less than six months after Ordinance No. 124 N.S. was adopted. It is manifest that general land-use planning discussions and related decision-making by elected officials must be both unhampered and public. Together or singly, neither process constitutes a "taking" of the property under consideration. Any other conclusion would violate sound public policy.

Our appellate courts have recognized the appropriate controlling principles. "*Selby* [*supra*, 10 Cal.3d 110] made clear that *Klopping* [*supra*, 8 Cal.3d 39] was no support for a claim that planning designations constitute takings." (*Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App. 3d 1, 4 [120 Cal.Rptr. 108].) As was noted in *City of Walnut Creek v. Leadership Housing Systems* (1977) 73 Cal.App.3d 611 [140 Cal.Rptr. 690], ". . . the inclusion of the property for public use in a general plan does not give rise to a cause of action. If calling a bond election and urging passage to secure funds for a public purpose constituted a taking, the agency so acting would be subject to suit whether or not the issue carried. The expression of political preference cannot be so burdened." (Pp. 622-623.)

Recognizing the constitutionally protected property interests here involved, we also accept the reasonable latitude which must be afforded public officials in the planning for and implementation of legitimate land use goals. These twin purposes will be served by preserving for the landowner, in appropriate cases, declaratory relief or mandamus remedies. However, the use of inverse condemnation with its imposition of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power.

The judgment is affirmed.

Bird, C. J., Tobriner, J., Mosk, J., Manuel, J., and Newman, J., concurred.

CLARK, J., Dissenting.—"Private property may be taken *or damaged* for public use *only* when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19; italics added.) "Damage," as used in the constitutional provision, has always included diminution in intrinsic value even when falling short of actual taking, spoilation or invasion. (*Reardon v. San Francisco* (1885) 66 Cal. 492 [6 P. 317].)

It must be clear to all of us that, as alleged by plaintiffs, the City of Tiburon has decided through the political process that in order to preserve its way of life and to maintain what is already among the highest residential land values in the state,[1] certain of its property owners must sacrifice use of their lands. Such lands—including plaintiffs'—are thus alleged to have been damaged in order to preserve or enhance the value of undisturbed land. This is the clearest of examples wherein our system functions " 'to sacrifice the individual to the community, and it seems very difficult in reason to show why the [City of Tiburon] should not pay for property which it destroys or impairs the value . . . .' " (*Bacich v. Board of Control* (1943) 23 Cal.2d 343, 351 [144 P.2d 818].)

Recognizing the policy considerations in resolving the question when a "taking" must be paid for by government and when it may be deemed merely a permissible intrusion incident to governmental function, the United States Supreme Court has stated that a factual consideration "is the extent of the diminution [of property value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise

[1]It is alleged by plaintiffs' complaint and admitted by the city's demurrer that the City of Tiburon has "the highest land value per acre for suburban areas in the State of California."

of eminent domain and compensation to sustain the act." (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [67 L.Ed. 322, 325, 43 S.Ct. 158, 28 A.L.R. 1321].) What greater diminution can there be than where—as here—plaintiffs have alleged and the City of Tiburon has admitted that the ordinance complained of "has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever . . ."? We have said that the "underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute through the community the loss inflicted upon the individual by the making of public improvements' [citation]; 'to socialize the burden . . .—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society' [citation]." (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 [90 Cal.Rptr. 345, 475 P.2d 441].) If those words have any meaning at all this must be the case where they are applicable—unless, of course, the majority deem they are not bound by the honored rule of law which prevents the court on a demurrer from finding factual matters contrary to matters well pleaded in the complaint.[2] (See, *Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)

[2]Conclusionary allegations of damage to property are insufficient to support—against a demurrer—a complaint in inverse condemnation. (See *Hecton v. People ex rel. Dept. of Transportation* (1976) 58 Cal.App.3d 653 [130 Cal.Rptr. 230].) Additionally, the particular facts of the case must be set out in the complaint. (*Id.*, at p. 657.) Plaintiffs have alleged with factual particularity the significant activities taking place prior to and constituting the inverse condemnation. They also allege the lack of remaining reasonable beneficial use resulting from these activities. (Cf. *Pineheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328 [131 Cal.Rptr. 633].)

The majority opinion attempts to justify its judgment on the ground that plaintiffs—if they are entitled to relief at all—must look to some remedy other than inverse condemnation. (*Ante*, p. —.) While purporting to recognize that the Fifth Amendment mandates "private property shall not be taken for public use, without just compensation," that the " 'constitutional provision is addressed to every sort of interest the citizen may possess' " (*ante*, p. —), and that "we cannot countenance the service of [the need of government to improve the quality of life] through the uncompensated destruction of private property rights" (*id.*), the majority refuse to follow these precepts. Their refusal is grounded on their mistaken analysis of this court's earlier decision in *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237].

In *HFH* the majority held that inverse condemnation does not lie in a downzoning action when the complaint alleges mere reduction in market value. That case expressly stands for the proposition that a zoning ordinance which "merely decreased the market value of property" does not necessarily violate constitutional provisions "forbidding uncompensated taking or damaging" of property. (*HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 518.) If, as the majority held in *HFH*, the difference between "merely decreasing" a property value on the one hand and "taking" a property interest on the other is one of degree, the majority today—in view of the admitted allegation that the ordinance "has completely destroyed the value of plaintiffs' property for any purpose or use whatsoever"—obliterate that distinction. Under today's holding inverse condemnation is no longer an available remedy—perhaps short of government actually dispossessing an owner—whatever the harshness of a zoning regulation.

The distinction which the majority purport to carefully draw in *HFH* has been rejected and that case provides no support for today's decision.

Until today, this court has adhered to its rule that a harsh zoning regulation gives rise to inverse condemnation. (See *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 46 [104 Cal.Rptr. 1, 500 P.2d 1345].) The rule, moreover, is compelled by the Legislature: "The Legislature hereby . . . declares that this article [Open-Space Zoning] is not intended and shall not be construed, as authorizing the city . . . to exercise its power to adopt . . . an open-space zoning ordinance in a manner which will . . . damage private property for public use without the payment of just compensation therefor." (Gov. Code, § 65912; see also, Gov. Code, § 51073.) However, the majority reject the established rule and legislative direction in disapproving the recent case of *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575] (petn. for hg. den. July 15, 1976). That case involves a particularly harsh zoning ordinance. The court concluded, after a detailed review of pertinent decisions, "that a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." (*Id.*, at p. 621.) The "leading authority" relied on by the majority (*ante*, p. —) is in agreement with *Eldridge*. (See, 1 Nichols on Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121; 2 Nichols on Eminent Domain (3d rev. ed. 1978) Taking and Damage, § 6.3, p. 6-65.)

When a zoning restriction is so harsh as to transcend a constitutionally protected property right is a question

of fact to be determined by trial rather than by demurrer. (See *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338-339 [175 P.2d 542]; *Eldridge v. City of Palo Alto, supra,* 57 Cal.App.3d 613, 628.) Plaintiffs have well pleaded a cause of action in inverse condemnation, and should be afforded an opportunity to prove their allegations.

Today's real issue is the extent to which a court will permit—even encourage—governmental agency intrusion into a constitutionally protected area. The majority argue we must condone greater intrusion; that we must recognize "changing attitudes toward the regulation of land use" (*ante,* p. —); that community planners must be permitted the flexibility which their work requires (*ante,* p. —); that the use of inverse condemnation "will have a chilling effect upon the exercise of police regulatory powers at a local level" and " 'will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe' " (*id.*); and that enactment of a zoning ordinance being essentially a legislative process, courts should cease affording a legal remedy in inverse condemnation.[3]

[3]The majority's holding unnecessarily goes far beyond a mere determination that—in the majority's view—plaintiffs in this case are entitled to no relief. In the concluding portions of the majority opinion it is stated—although as earlier noted contrary to established rules on review of judgments following sustaining of demurrer—that the Tiburoan ordinance does not deprive plaintiffs of "substantially all resonable use" of their property (*Ante,* p. —.) Thus *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508, requires rejection of plaintiffs' claim because there has been a "mere diminution" of value as opposed to a taking of property, according to the majority. The majority's further assertion that inverse condemnation is no longer available to compensate an aggrieved landowner, appears to be—after more than a century of settled law

Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation. While the majority of this court can finally declare that such a taking does not offend local constitutional prohibitions, their judgment does not foreclose federal constitutional examination. It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. The United States Supreme Court will hopefully adhere to Justice Holmes' admonition that "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. 393, 416 [67 L.Ed. 322, 326]; see also *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594 [8 L.Ed.2d 130, 134, 82 S.Ct. 987]; *Armstrong v. United States* (1960) 364 U.S. 40, 49 [4 L.Ed.2d 1554, 1561, 80 S.Ct. 1563]; *U.S. v. Central Eureka Mining Co.* (1958) 357 U.S. 155, 168 [2 L.Ed.2d 1228, 1236, 78 S.Ct. 1097]; *Berman v. Parker* (1954) 348 U.S. 26, 36 [99 L.Ed. 27, 39, 75 S.Ct. 98]; *U.S. v. Willow River Co.* (1945) 324 U.S. 499, 502 [89 L.Ed. 1101, 1107, 65 S.Ct. 761); *Block v. Hirsch* (1921) 256 U.S. 135 [65 L.Ed. 865, 41 S.Ct. 458, 16 A.L.R. 165].) Lower federal court decisions are universally contrary to the majority opinion in this case. When the Richmond Redevelopment Agency

to the contrary—obiter dicta. Such far-reaching pronouncement would be better left to another day and case wherein the issue is squarely presented and the parties have full opportunity to address it.

urged that because it exercised police powers it did not have to pay just compensation to a landowner, the Ninth Circut held: "It is clear . . . that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects." (*Richmond Elks Hall Assn. v. Richmond Redevelopment* (9th Cir. 1977) 561 F.2d 1327, 1332; see also *Beneson v. United States* (Ct.Cl. 1977) 548 F2d 939, 947; *Drakes Bay Land Company v. United States* (Ct.Cl. 1970) 424 F.2d 574, 584; *Dahl v. City of Palo Alto* (N.D.Cal. 1974) 372 F.Supp. 647, 648-649.)

The Supreme Court's latest expression of continuing adherence to the mandate of the Fifth and Fourteenth Amendments is contained in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency* (1979)—U.S. —[59 L.Ed.2d 401, 99 S.Ct. —]. In that case lands originally zoned as residential and commercial were rezoned by an interstate agency to allow limited residential use subordinated to public recreational use. Property owners claimed that the land use ordinance constituted inverse condemnation. The district court held that a cause of action for inverse condemnation was sufficiently alleged but that the action could not be maintained against the interstate agency, and that individual members of the agency were immune from suit. The court of appeals held that the interstate agency was federal in character, that the agency was therefore immune under the Eleventh Amendment, and that individual members of the agency were also immune. The Supreme Court answered by holding a cause of action was properly alleged, and that the interstate agency was neither federal in character nor immune, although individual agency members were immune.

While the court was primarily concerned with immunity issues, the sense of the holding is that an action in inverse condemnation lies for a taking brought about by land use regulation of the very nature involved in the instant case.

Particular areas of concern must be seen arising from today's decision. First, the majority's solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties.

Perhaps of greater concern is the consequence that Tiburon—and many other govenmental agencies enacting similar land use plans—will price properties within their control out of reach of most people. Only the most wealthy will be able to afford purchase of and construction on lands in such areas. The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.

I reject the majority rationalization. It abdicates our responsibility to give meaning and substance to constitutional mandate.

Today's decision must further encourage city councils and their zoners to politically preserve entrenched property use. The decision not only shuts Mr. Agins out from our courtroom, but also his successor-owners from sharing a nice but exclusive environment.

The judgment of dismissal should be reversed.

APPENDIX B.

Judgment of Dismissal.

Superior Court of California, County of Marin.

Donald W. Agins and Bonnie G. Agins, Plaintiffs, v. City of Tiburon, a municipal corporation, and Does One through Fifty, Defendants. No. 75873.

Filed: May 5, 1976.

The Court having sustained the demurrer of Defendant City of Tiburon to the First Cause of Action in the Complaint herein without leave to amend and having sustained the demurrer of said Defendant to the Second Cause of Action therein with ten days leave to amend and Plaintiffs having failed to so amend.

The above entitled action is hereby dismissed with prejudice.

DATED: May 5, 1976

/s/ Jack L. Blaine
JACK L. BLAINE
JUDGE OF THE SUPERIOR COURT
PRO TEM

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

Donald W. Agins, et al, Plaintiffs and Appellants, v. City of Tiburon, et al, Defendants and Respondents. No. S.F. 23866, (Super. Ct. No. 75873).

Filed: July 6, 1979.

Notice is hereby given that DONALD W. AGINS and BONNIE G. AGINS, the Plaintiffs and Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California affirming the judgment of dismissal, entered in this action on May 17, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).
Dated: July 5, 1979.

REGINALD G. HEARN
100 California Street
San Francisco, California 94111

POLLOCK, WILLIAMS & BERWANGER
JOHN P. POLLOCK
800 West Sixth Street - Suite 820
Los Angeles, California 90017

GIDEON KANNER
P.O. Box 5133
Sherman Oaks, California

/s/ By John P. Pollock
JOHN P. POLLOCK
Attorneys for Plaintiffs and Appellants

PROOF OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 800 West Sixth Street, Suite 820, Los Angeles, California 90017.

On July 5, 1979, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the Defendants and Respondents in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Robert I. Conn
City Attorney

Gary T. Ragghianti
Deputy City Attorney,
City of Tiburon
1534 Fifth Avenue
San Rafael, California 94901

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on July 5, 1979, at Los Angeles, California.

/s/ Jennie M. Butler
Jennie M. Butler

APPENDIX D.

Ordinance No. 123 N.S.

AN ORDINANCE OF THE CITY OF TIBURON AMENDING SECTION 10-4, ADDING SECTION 10-4.1 (RESIDENTIAL PLANNED DEVELOPMENT AND OPEN SPACE ZONES) AND SECTION 10-4.2 OF ORDINANCE NO. 9 N. S. (RESIDENTIAL MULTIPLE PLANNED ZONE) TO THE TIBURON ZONING ORDINANCE, AMENDING SECTION 23 BY ADDING CONDITIONAL USES IN THE RPD ZONES, AMENDING SECTION 6-28, AND BY ADDING SECTION 6-61.1.

The City Council of the City of Tiburon does hereby ordain as follows:

Section 1: Findings. The City Council does hereby find and declare as follows:

(a) Through its general plan and zoning ordinances based thereon, the City of Tiburon provides a community in which essentially most types of traditional land uses are permitted. This includes lands devoted to the following uses: residential, commercial, agricultural, recreational and community service facilities, both public and private. This variety of developed land uses is oriented and available to and utilized by all social and economic levels. Having provided this extensive range of uses, recognizing that the category of open space land is a land use equal in importance to the traditional categories enumerated above; further recognizing that the City of Tiburon has a vital interest in the protection and preservation of open space land for the benefit of all of its citizens; and further recognizing that, once portions or all of the remaining open

space land within City limits is permitted to develop with any substantial degree of intensity as traditionally permitted, the opportunity to recover its open space character will have been virtually lost, the City Council finds and declares that open space land is a critically limited and valuable resource which must be preserved and conserved wherever possible.

(b) The preservation and conservation of open space land is necessary to assure its continued availability for agricultural purposes, for the enjoyment of scenic beauty, for recreation, for protection of the ecology and environment, for the containment of urban development, and for retention in its natural or near natural state to protect the community against hazards resulting from its disturbance by man or nature.

(c) It is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences [of] sic urban sprawl.

(d) The Open Space Element of the Tiburon General Plan has been the subject of extensive study and deliberation by the staff, Planning Commission and Council, drawing upon a wide variety of relevant expertise. This effort has resulted in the development of a statement of functions, goals, policies, action programs, classifications and inventories of open spaces. This Open Space Element must be implemented, among other ways, by a comprehensive regulatory zoning ordinance governing the uses of open space land. Further, the anticipated increase in the populatuion of the Tiburon Peninsula demands that the City effectuate the

Open Space Element of the Tiburon General Plan at the earliest possible date and thereby assure that the interests of all of its people are met through the orderly growth and development of the City and the preservation and conservation of its limited and valuable resources.

Section 2. Amendment. The City Council hereby amends Section 10-4 of Ordinance No. 9 N.S., the Tiburon Zoning Ordinance, to read as follows:

"*Section 10-4: RESIDENTIAL PLANNED DEVELOPMENT AND OPEN SPACE ZONE (RPD-1).*

(A). *Purpose.* The purpose and intent of this zone is (a) to protect the public health, safety and welfare; (b) to protect and preserve open space land as a limited and valuable resource; (c) to permit the reasonable use of open space land, while at the same time preserving and protecting its inherent open space characteristics to assure its continued availability for the following: as agricultural land, scenic land, recreation land, conservation or natural resource land; for the containment [of] sic urban sprawl and the structuring of urban development, and for the retention of land in its natural or near natural state to protect life and property in the community from the hazards of fire, flood and seismic activity; and (d) to coordinate with and carry out federal, state, regional, county and city open space plans.

(B). *Definitions.* As used in this section, unless otherwise apparent from the context, the following definitions shall apply:

1. "Conservation or Natural Resource Land", land which possesses or encompasses conservation or natural resources.

2. "Conservation or Natural Resource" includes, but is not necessarily limited to, streams, watersheds, ground water recharge, soils, wildlife habitat, as defined herein, special land forms, natural vegetation.

3. "Open Space Land", any parcel or area of land essentially unimproved or in its natural state, and devoted to an open space use as defined herein, and which is designated in the Open Space Element for an open space use.

4. "Residential Planned Development and Open Space Zone", any area of land or water designated RPD and subject to all of the terms and regulations of this section.

5. "Open Space Use" means the use of land for

a. Public recreation.

b. Enjoyment of scenic beauty.

c. Conservation or use of natural resources.

d. Protection of man and his artifacts (buildings, property, etc.).

e. Containment and structuring of urban development.

6. "Recreation land", any area of land or water susceptible to recreational uses.

7. "Scenic land", any area of land or water which possesses scenic qualities worthy of preservation.

8. "Wildlife habitat", any area of land or water valuable or necessary to the preservation or enhancement of wildlife resources.

(C). *Uses Allowed By Right.*

1. One-family dwellings.

2. Open-space uses.

3. Accessory buildings and accessory uses.

(D). *Land and Structure Regulations.*

1. *Density.* Density shall be not less than .2 nor more than 1 dwelling unit per gross acre, subject to the provisions of section 10-4(F) below.

2. *Maximum Building Height.* No principal building shall exceed 30 feet in height, and no accessory building shall exceed 15 feet in height.

3. The development of dwellings or dwelling groups that create the appearance of apartment-like structures through excessive mass, bulk, or repetition of design features, shall be prohibited.

(E). *Permanence of Open Space.* Land to be preserved as open space shall be maintained as permanent open space by dedication to the City of fee title or of scenic easements, by deed restriction approved by the City Attorney, or by other methods acceptable to the City.

(F). *Standards.* In reviewing the elements of the Master Plan, particularly, but not limited to, the density, circulation system and lot design, consideration shall be given to, and affirmative findings must be made by the Planning Commission and City Council on, the following factors:

1. Whether the density sought in the proposed development is compensated for by surrounding open areas.

2. Whether the proposed arrangement of residential units and design of the circulation system provide for an adequate transition and maximum compatibility with adjoining patterns of development and open space.

3. Whether maximum effort has been made to minimize grading and maximize retention and preservation

of natural elevations, ridgelands and natural features, including lands too steep for development, geologically unstable areas, wooded canyons, areas containing significant native flora and fauna, rock outcroppings, view sites, areas suitable for active or quiet recreation, watersheds and watercourses. Ridgelines shall be preserved through siting and building controls to minimize visual impact and to allow access along corridors.

4. Whether the plan will be desirable to the public convenience and welfare and will be in harmony with the Open Space, and other Elements and objectives of the Tiburon General Plan.

(G). *Requirements of Master and Precise Plans.* Owners of land within the RPD zone who desire development shall, prior to any land or road grading or subdivision, and prior to any improvements being made on said property, submit a Master Plan to the Planning Commission, together with the required fee. No building permit shall be issued for improvements of any type until a Master Plan and Precise Plan for the development have, after public hearing, been approved by resolutions of the Planning Commission, and only until after the City Council, after Public hearing, has by ordinance approved the Master Plan and by resolution, the Precise Plan. The procedure for approval of the Master Plan shall be the same as that provided under State law for the adoption of a zoning ordinance.

1. *Master Plan.*

a. The Master Plan and Text shall be prepared by such qualified professional practitioners in city planning, urban design, architecture, landscape architecture, and civil and structural engineering as may be directed by the city agency approving said plans. The Master Plan shall include all contiguous property under a

single ownership and shall include such information as may be appropriate for purposes of interrelating the proposed development with existing and proposed uses of adjacent property.

b. The Master Plan shall include:

(1) A general site plan showing the following:

(a) existing and proposed locations and uses of all structures and areas.

(b) lot design, circulation system including existing and proposed streets, walkways, and other rights-of-way or easements.

(c) preliminary grading, drainage, and landscaping proposal indicating existing and proposed topography at appropriate contour intervals, location of existing trees and groupings and other natural features and proposed landscape treatment showing location and types of trees, ground cover, walkways, paving and fencing.

(2) Preliminary elevations, perspectives, and sufficient visual and written information to indicate proposed setbacks, height, bulk, coverage, density, indoor-outdoor relationships, relationships between structures, and predominant views by occupants and other users of the site and structures.

(3) A statement of concepts, indicating how the development satisfies relevant human needs for open space, views, variety, harmony within the development and the surrounding areas, and clarity of organization.

(4) A proposal for dedication and/or improvement and maintenance of open space, circulation ways, view easement and recreation areas for all property included in the Master Plan.

2. *Precise Plan.*

a. Subsequent to the approval of the Master Plan by the Planning Commission and the City Council, the applicant shall submit to the Planning Commission a Precise Plan, in substantial conformance to the Master Plan, pursuant to the provisions of section 27-2, together with the required fee.

b. Detached structures may be exempt from Precise Plan procedures only if so specified as part of the previous Master Plan approval.

c. In addition to the information required to be submitted with the Precise Plan by section 27-2, the applicant shall submit the following data:

(1) Engineering studies in sufficient detail to indicate adequacy of soils, flood control, storm drainage, sewage disposal, and public utilities for the property; such engineering studies shall include an in-depth geologic and soils investigation and examination and shall fully and clearly present: (a) all pertinent data, interpretations and evaluations; (b) the significance of the data, interpretations and evaluations with respect to the actual development or implementation of the intended land use, and with respect to the effect upon future geological processes both on and off the site; (c) recommendations for any additional investigations that should be made. All costs and expenses incurred as a result of the requirements of this section including the costs and expense of an independent review of the material submitted hereunder by qualified persons retained by the City, shall be borne by the applicant.

(2) A staging proposal indicating sequence and approximate time schedule for all development indicated.

3. *Amendments.* The Master and Precise Plans may be amended or modified by following the same procedure required to adopt said plans.

4. In the event that the data submitted with the Precise Plan pursuant to Section 10-4(G)2, particularly, but not limited to, the engineering studies, indicate that the proposed arrangement of residential units, design of the circulation system or density, as shown on the previously approved Master Plan, would be rendered inharmonious with the Tiburon General Plan, or would be inconsistent with the standards contained in this section, then the City or the applicant shall initiate proceedings to amend the Master Plan to reflect the changes shown by said data.

5. *Revocation and Expiration.*

a. Precise Plans shall automatically expire one year after their approval by the City Council unless construction has been commenced within that year or unless previously extended by resolutions of the Planning Commission and City Council.

b. Master Plans shall automatically expire two years after their approval by the City Council unless construction has been commenced within that two-year period, or unless previously extended by resolutions of the Planning Commission and City Council.

Section 3. Amendment. Section 10-4.1 is hereby added to Ordinance No. 9 N.S., the Zoning Ordinance, to read as follows:

"SECTION 10-4.1: RESIDENTIAL PLANNED DEVELOPMENT AND OPEN SPACE ZONE (RPD-2).

This zone shall have the same purposes, definitions, uses, land and structure regulations, standards and pro-

cedures as in the RPD-1 zone, except that density shall be not less than 1.1 nor more than 2.5 dwelling units per gross acre."

Section 4. Amendment. Section 10-4.2 is hereby added to Ordinance No. 9 N.S., the Zoning Ordinance, to read as follows:

"Section 10-4.2: RESIDENTIAL MULTIPLE PLANNED AND OPEN SPACE ZONE (RMP).

This zone shall have the same purposes, definitions, uses, standards and procedures as in the RPD-1 zone, except as follows:

(A). Uses allowed by right shall include multi-family dwellings.

(B). *Land and Structure Regulations.*

1. *Density.* Density shall be not less than 3 nor more than 13 dwelling units per gross acre, subject to the provisions of Section 10-4(E).

2. *Maximum Building Height.* No principal building shall exceed 30 feet in height, and no accessory building shall exceed 15 feet in height.

3. *Floor Area Ratio.* The floor area ratio shall not exceed 40%.

4. If the average natural slope of the lot or parcel is over 15%, the minimum lot area per dwelling unit shall be as follows:

Slope	Lot area required
15-20%	3,500 sq. ft./unit
20-25%	5,250 sq. ft./unit
25-30%	7,000 sq. ft./unit
30-35%	10,500 sq. ft./unit
35-45%	14,000 sq. ft./unit

Section 5. Amendment. Section 6-28 of Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended to read as follows:

"6-28: Floor Area, Floor Area Ratio: "Floor area ratio", or "F.A.R." means the floor area of the building or buildings on a lot, divided by the area of that lot. "Floor area" is the sum of the gross horizontal areas of the several floors of the building or buildings measured from the exterior faces of the exterior walls and shall exclude the following: all unenclosed horizontal surfaces such as balconies, courts, decks, porches, terraces."

Section 6. Amendment. Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended by adding Section 6-61.1, to read as follows:

"6-61.1: Slope, Average Natural: The average of the natural ground slope of a lot or parcel, measured at 90° to contours."

Section 7. Amendment. Section 23(L) of Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended to read as follows:

"(L) The keeping of horses in A-2, AR, RO-1, RO-2, R-1, RPD-1 and RPD-2 zones, subject to the obtaining of a license for each horse pursuant to the Tiburon Horse License Ordinance. Each such use permit shall be terminable upon the revocation of the license issued under the Horse License Ordinance and subject to the minimum lot area requirements of said ordinance."

Section 8. Amendment. Section 23 of Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended by adding subsections (M), (N), and (O), to read as follows:

"(M) Agricultural uses in the RPD-1 and RPD-2 zones.

(N) botanical conservatories, outdoor nature laboratories and similar facilities in the RPD-1 and RPD-2 zones.

(O) Nature wildlife sanctuaries in the RPD-1 and RPD-2 zones."

Section 9. Separability. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council of the City of Tiburon hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases may be declared invalid or unconstitutional.

Section 10. Effective Date. This ordinance shall take effect and be in force thirty days after the date of passage, and before the expiration of fifteen days after its passage, the same shall be published, with the names of the members voting for and against the same, at least once in a newspaper of general circulation published in the City of Tiburon.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Tiburon held on June 28th, 1973, by the following vote:

AYES: Councilmen: Aramburu, Fanning, Sennett

NOES: Councilmen: Becker

ABSENT: Councilmen: Littman

S/Branwell Fanning
BRANWELL FANNING
Mayor of the City of Tiburon

ATTEST:
S/Bert Balmer
BERT BALMER, City Manager/Clerk

APPENDIX E.

Ordinance No. 124 N.S.

AN ORDINANCE OF THE CITY OF TIBURON AMENDING ORDINANCE NO. 9 N.S., THE TIBURON ZONING ORDINANCE, BY AMENDING THE ZONING MAP TO CHANGE THE CLASSIFICATION OF CERTAIN PROPERTY LOCATED IN THE CITY OF TIBURON FROM R-1-C, R-P, P, RO-1-C, RO-2-C, RO-1 AND RO-2 TO RPD-1 AND RPD-2, AND FROM R-3 TO RMP.

The City Council of the City of Tiburon does hereby ordain as follows:

Section 1. Findings.

The City Council does hereby find and declare as follows:

(a) Through its general plan and zoning ordinances based thereon, the City of Tiburon provides a community in which essentially most types of traditional land use are permitted. This includes lands devoted to the following uses: residential, commercial, agricultural, recreational and community service facilities, both public and private. This variety of developed land uses is oriented and available to and utilized by all social and economic levels. Having provided this extensive range of uses; recognizing that the category of open space land is a land use equal in importance to the traditional categories enumerated above; further recognizing that the City of Tiburon has a vital interest in the protection and preservation of open space land for the benefit of all of its citizens; and further recognizing that, once portions or all of the remaining open land within city limits is permitted to develop

with any substantial degree of intensity as has been traditionally permitted, the opportunity to recover its open space character will have been virtually lost; the City Council finds and declares that open space land is a critically limited and valuable resource which must be preserved and conserved wherever possible.

(b) The preservation and conservation of open space land is necessary to assure its continued availability for agricultural purposes, for the enjoyment of scenic beauty, for recreation, for protection of the ecology and environment, for the containment of urban sprawl and structuring and shaping of urban development, and for retention in its natural or near natural state to protect the community against hazards resulting from its disturbance by man or nature.

(c) It is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl.

(d) The Open Space Element of the Tiburon General Plan has been the subject of extensive study and deliberation by the staff, Planning Commission, and Council, drawing upon a wide variety of relevant expertise. This effort has resulted in the development and adoption of a statement of functions, goals, policies, action programs, classifications and inventories of open spaces. This Open Space Element must be implemented, among other ways, by a comprehensive regulatory zoning ordinance governing the uses of open space land.

Further, the anticipated increase in the population of the Tiburon Peninsula demands that the City effectuate the Open Space Element of the Tiburon General Plan at the earliest possible date and thereby assure that the interests of all of its people are met through the orderly growth and development of the City and the preservation and conservation of its limited and valuable resources.

(e) The unique characteristics of the property which is rezoned by this ordinance consist of a wide variety of features which indicate the desirability of minimizing overdevelopment of said property. Much of the area is excessively steep and slope stability ranges from good to poor. The ridges and slopes are a scenic asset as viewed from other areas.

(f) The people of the State, by enacting Article XXVIII, "Open Space Conservation", of the California Constitution in 1966, and the State Legislature have demonstrated increasing concern, interest and the desire to preserve and protect open space. In 1970 and 1971 the State enacted legislation to require addition of an open space element to city and county general plans and prohibiting issuance of building permits, approval of subdivisions, or adoption of zoning ordinances inconsistent therewith. The Legislature declared its intent as follows:

> "(a) To assure that cities and counties recognize that open space land is a limited and valuable resource which must be conserved wherever possible.
>
> (b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans,

will accomplish the objectives of a comprehensive open-space program."

The Legislature found and declared as follows:

"(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of its residents, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses / is a matter of public interest and will be of benefit to urban dwellers because it will discourage non-contiguous development patterns which unnecessarily increase the cost of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by the charter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land." (Government Code §66561.)

(g) The State has further shown its concern, interest, and desire to preserve and protect open space by:

(1) Requiring general plans of cities and counties to contain a conservation element.

(2) Broadening the jurisdiction of local planning commissions to include the preservation and conservation of open space land.

(3) Prohibiting the construction of streets or street improvements until the planning commission has reviewed the same as to compliance with open space provisions of the general plan.

(4) Requiring cities to adopt zoning consistent with open space elements of the general plan.

(5) Prohibiting approval of a subdivision map if it is likely to cause substantial environmental damage or substantially and unavoidably injure fish or wildlife or their habitat.

(h) The RPD-1 and 2 zones and the RMP zone permit economically viable uses consistent with the open space preservation necessity outlined above.

Section 2. Amendment.

The public peace, health, safety, welfare, general prosperity and public interest require the amendment of Ordinance No. 9 N.S., the Zoning Ordinance, by amending the Zoning Map to change the classification of certain property lying within the City of Tiburon, from R-1-C, R-P, P, RO-1-C, RO-2-C, RO-1 and RO-2 to RPD-1 and RPD-2, and from R-3 to RMP,

as more fully shown on Exhibit A attached hereto and made a part hereof by reference.

Section 3. Separability.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council of the City of Tiburon hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases may be declared invalid or unconstitutional.

Section 4. Effective Date.

This ordinance shall take effect and be in force thirty days after its passage, and before the expiration of fifteen days after its passage, the same shall be published, with the names of the members voting for and against the same, at least once in a newspaper of general circulation published in the City of Tiburon.

PASSED AND ADOPTED at a adjourned meeting of the City Council of the City of Tiburon held on June 28, 1973, by the following vote:

AYES: Councilmen: Aramburu, Fanning, Sennett

NOES: Councilmen: Becker

ABSENT: Councilmen: Littman

S/Branwell Fanning
BRANWELL FANNING
Mayor of the City of Tiburon

ATTEST:
S/Bert Balmer
BERT BALMER, City Manager/Clerk

APPENDIX F.

Selected Sections of the Government Code of the State of California.

§6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

§6951. The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.

§6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

§6953. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes

a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purpose of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

§6954. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

§ 65560.

(a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including

habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

§65561.

The Legislature finds and declares as follows:

(a) That the preservation of open-space land, as defined in this article, is necessary not only for the

maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.

§ 65562.

It is the intent of the Legislature in enacting this article:

(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.

(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.

§ 65563.

On or before * * * December 31, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction. Every city and county shall by August 31, 1972, prepare, adopt and submit to the Secretary of the Resources Agency, an interim open-space plan, which shall be in effect until * * * December 31, 1973, containing, but not limited to, the following:

(a) The officially adopted goals and policies which will guide the preparation and implementation of the open-space plan; and

(b) A program for orderly completion and adoption of the open-space plan by * * * December 31, 1973, including a description of the methods by which open-space resources will be inventoried and conservation measures determined.

§ 65566.

Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

§ 65567.

No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

§ 65910.

Every city and county by December 31, 1973, shall prepare and adopt an open-space zoning ordinance consistent with the local open-space plan adopted pursuant to Article 10.5 (commencing with Section 65560) of Chapter 3 of this title.

§ 65911.

Variances from the terms of an open-space zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

This section shall be literally and strictly interpreted and enforced so as to protect the interest of the public in the orderly growth and development of cities and counties and in the preservation and conservation of open-space lands.

§ 65912.

The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.